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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CENTRAL DIVISION**

IOLA FAVELL, SUE ZARNOWSKI,
and MARIAH CUMMINGS, on behalf
of themselves and all others similarly
situated,

Plaintiffs,

v.

UNIVERSITY OF SOUTHERN
CALIFORNIA and 2U, INC.,

Defendants.

Case No. 2:23-cv-00846 SPG (MARx)

CLASS ACTION

**2U, INC.'S NOTICE OF MOTION
AND MOTION TO DISMISS CLASS
ACTION COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Judge: Hon. Sherilyn Peace Garnett
Date: May 17, 2023
Time: 1:30 P.M.
Place: Courtroom 5C

*[Request for Judicial Notice; Declaration
in Support; Proposed Orders concurrently
filed herewith]*

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on May 17, 2023 at 1:30 p.m., or as soon thereafter as the parties may be heard, before the Honorable Sherilyn Peace Garnett, District Judge, United States District Court for the Central District of California, in the First Street Courthouse, Courtroom 5C, 350 W. 1st Street, Los Angeles, CA 90012, Defendant 2U, Inc. (“2U”) will, and hereby does, move to dismiss the Class Action Complaint (“Complaint”) brought by Plaintiffs Iola Favell, Sue Zarnowski, and Mariah Cummings (collectively, “Plaintiffs”) pursuant to Federal Rules of Civil Procedure (“FRCP”) 9(b) and 12(b)(6).

Pursuant to Local Rule 7-3 and Rule G(1) of Judge Garnett’s Standing Order for Newly Assigned Civil Cases, the Parties thoroughly discussed the substance and potential resolution of the filed motion by videoconference on March 1, 2023. This motion is based on this Notice of Motion and Motion to Dismiss, the following Memorandum of Points and Authorities, 2U’s Request for Judicial Notice, the Declaration of Melanie M. Blunschi and the exhibits thereto, all pleadings and papers in this action, and any oral argument of counsel.

Dated: March 8, 2023

Respectfully submitted,

LATHAM & WATKINS LLP
Elizabeth L. Deeley
Melanie M. Blunschi
Roman Martinez

By /s/ Melanie M. Blunschi
Melanie M. Blunschi

Attorneys for Defendant 2U, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit arises out of revelations that the University of Southern California (“USC”) allegedly submitted incomplete data about the selectivity of graduate programs offered at its education school, USC Rossier, to U.S. News & World Report (“US News”) in a bid to achieve a higher ranking. That alleged misconduct has nothing to do with 2U, an education technology company that provides USC technology, marketing, and other services to support its online degree programs. Plaintiffs do not claim that 2U ever submitted survey responses or program data to US News as part of its ranking process for USC Rossier, or that 2U knew USC’s rankings were allegedly based on misleading or incomplete data. Indeed, Plaintiffs’ own Complaint makes clear that the US News survey process involves only US News and the participating schools. Nonetheless, Plaintiffs sued 2U alongside USC for a host of fraud-based claims based on advertising that allegedly misled students because it included USC Rossier’s US News rankings or characterized USC Rossier as “top ranked.” All of Plaintiffs’ claims against 2U lack merit and should be dismissed.

Plaintiffs are three former students of USC Rossier online degree programs supported by 2U. The crux of their claims is that *USC* misled *US News* to achieve a higher ranking of USC Rossier. Plaintiffs say that after US News awarded and published high rankings for USC Rossier, “Defendants” misled them by reposting those rankings and referring to USC as “top ranked” in marketing materials. But Plaintiffs have not included a single well-pled allegation that 2U played any role in obtaining the rankings, knew (or even should have known) that the rankings were purportedly based on incomplete data, or made any of the rankings-related statements they claim to have relied on, which are statements on the “main Rossier website” that they concede was maintained by USC and not 2U. Plaintiffs use improper group pleading to try to stretch USC’s allegedly fraudulent interactions

1 with US News into false advertising claims against 2U, but they plead no facts
2 whatsoever tying 2U to that conduct.

3 Plaintiffs' failure to plead that 2U knew (or even should have known) that the
4 US News rankings were the product of alleged misconduct by USC is especially
5 troubling here, where each of the statements was literally true: USC Rossier *was* top
6 ranked by US News. Plaintiffs do not—and cannot—dispute that US News awarded
7 USC Rossier the precise rankings that were included in the marketing materials.
8 And to the extent Plaintiffs argue that the US News rankings *themselves* were the
9 misstatements, that argument cannot make it out of the gate. Under Ninth Circuit
10 precedent, a publication's ranking of colleges is a statement of opinion, not fact, that
11 cannot form the basis of a false advertising claim. *See Ariix, LLC v. NutriSearch*
12 *Corp.*, 985 F.3d 1107, 1121 (9th Cir. 2021). Publications like US News must rely
13 on inherently subjective decision-making to determine which criteria to consider
14 when ranking schools and how much weight to give them. *Id.* This flaw pervades
15 the Complaint and is fatal to all of Plaintiffs' claims against 2U.

16 Plaintiffs' claims must now be dismissed for three independent reasons. *First*,
17 Plaintiffs do not plead multiple essential elements of all of their misrepresentation-
18 based claims—not plausibly, and certainly not with the particularity required by
19 Rule 9(b). Most importantly, Plaintiffs do not properly allege (1) that 2U knew any
20 of the statements were false, (2) that any of the statements were actionable, or (3)
21 that 2U made any of the statements on which Plaintiffs claim to have relied. *Second*,
22 all of Plaintiffs' claims are barred by *Sonner v. Premier Nutrition Corp.*, 971 F.3d
23 834 (9th Cir. 2020), because their claims are equitable and Plaintiffs have not pled
24 that they lack an adequate remedy at law. *Third*, Plaintiffs' unjust enrichment
25 "claim" fails because it is not a cause of action under California law and Plaintiffs
26 have not adequately pled that 2U retained a benefit at their expense.

27

28

II. BACKGROUND

A. 2U's Relationship With USC

USC is a private, nonprofit research university located in Los Angeles. Complaint (“**Compl.**”) ¶ 14 (Dkt. 1-1). USC Rossier is USC’s graduate school of education. *Id.* ¶ 21. USC Rossier offers both masters and doctoral degrees, including a Masters in Teaching (“**MAT**”), a Doctor of Philosophy (“**PhD**”), and a Doctor of Education (“**EdD**”). *See id.* ¶¶ 58, 68. USC Rossier originally offered these programs exclusively on campus, but, like many other universities, USC Rossier now offers online degrees, including an online MAT and EdD. *See id.* ¶ 25.

USC has sole responsibility for administering its in-person programs, but it relies on 2U for certain services related to the administration of its online MAT and EdD programs. *See id.* 2U is an education technology company that helps colleges and universities build and deliver online degree and alternative credential programs. Ex. 1 at 1-4;¹ *see also* Compl. ¶ 23. USC first contracted with 2U in 2008 to help support the online MAT program, and in 2015, 2U agreed to support the online EdD program as well. Ex. 1 at 1; Compl. ¶ 25.

2U provides USC with an online learning platform, technology infrastructure support, and enrollment, marketing, and other student and faculty support services for USC Rossier’s online MAT and EdD programs. Ex. 1 at 1-3. But USC expressly retains ultimate control over any marketing materials and promotional strategies. For example, the parties’ contract states that 2U must develop and execute “a written plan and appropriate marketing materials” for the online programs, but that this “plan and all materials related to the [online programs] shall be subject to USC’s written approval prior to any use thereof.” *Id.* at 1(A). The contract further states that “USC shall promote the [online programs] on the Rossier website (including,

¹ Each exhibit cited is attached to the concurrently filed Declaration of Melanie M. Blunschi, and is incorporated by reference into the Complaint and subject to judicial notice, as detailed in 2U’s concurrently filed Request for Judicial Notice.

1 but not limited to, the homepage of that site) ... in a manner comparable to the
 2 promotion of Rossier's in-classroom MAT programs." *Id.* at 2(A) (emphasis added).

3 **B. The U.S. News & World Report Rankings**

4 Each year, US News publishes rankings of the country's leading academic
 5 degree programs. Participation in the US News rankings is voluntary, and not every
 6 accredited school participates each year. To generate these rankings, US News
 7 solicits and "collect[s] statistical and reputation data directly from education
 8 schools." Ex. 2 at 1. Schools who wish to participate complete "a lengthy survey
 9 that seeks information for all education programs offered by the school, including
 10 post-baccalaureate, non-degree granting programs, master's programs, educational
 11 specialist degree programs, and doctoral programs." Ex. 3 at 3. USC submits data
 12 on its own behalf, including for the online programs 2U helps administer. *See* Ex. 2
 13 at 1 (noting that data feeding US News rankings comes "directly from education
 14 schools"); Ex. 3 at 5 ("US News required schools to verify the accuracy of their
 15 submissions"). Plaintiffs do not allege that 2U was ever involved in USC Rossier's
 16 submission of data to US News, much less that 2U itself submitted data on USC
 17 Rossier's behalf. *See* Ex. 1 at 1 (detailing 2U's role in administering the online
 18 programs, with no mention of the rankings process); Ex. 3 at 1 (USC had exclusive
 19 responsibility for US News rankings submissions).

20 Each US News ranking is based on different factors called "indicators," which
 21 vary from year to year. For example, the 2023 "Best Education School" ranking
 22 considered eleven different indicators, including "selectivity" criteria such as test
 23 scores and acceptance rates, "faculty resource" information such as student-teacher
 24 ratios, "quality" metrics that included reputational assessments from peer
 25 institutions and educators, and "research activity" measures that assessed a
 26 university's research spend. Ex. 2 at 1.

27 USC Rossier participated in the 2009 through 2021 editions of US News's
 28 "Best Education School" rankings. *See* Compl. ¶ 57. In 2010, US News ranked

1 USC Rossier #22. *Id.* And from 2017 to 2021, US News ranked USC Rossier #15
2 (2017), #10 (2018), #12 (2019), #12 (2020), and #11 (2021). *Id.*²

3 C. USC's Counsel Investigates USC Rossier's US News Rankings

4 In January 2022, USC's Office of the General Counsel learned of potential
5 inaccuracies in USC Rossier's survey submissions to US News. Ex. 3 at 3; *see also*
6 Compl. ¶ 49. USC initiated an internal review and retained the Jones Day law firm
7 to investigate. Ex. 3 at 3. USC asked Jones Day to examine "whether [USC]
8 misreported information about the 'selectivity' of its doctoral programs by reporting
9 data on only one of its doctoral programs (its more selective PhD program) and
10 omitting data on its other doctoral programs (its less selective EdD programs)," and,
11 if so, "whether there was a persuasive justification for doing so." *Id.* at 1.

12 In April 2022, the firm issued a report (the "**Jones Day Report**"), concluding
13 that "[f]rom at least 2013 to 2021, the School misreported data to US News about
14 the selectivity of its doctoral programs." *Id.* More specifically, Jones Day found
15 that USC had failed to "report [selectivity] data on its EdD programs," instead
16 reporting "data on only its PhD program, which made the School's doctoral
17 programs appear to be more selective than they actually were." *Id.* Jones Day also
18 found that USC "did not typically include data relating to online EdD students in US
19 News surveys" at all, which it suggested "was a deliberate decision on the part of
20 [the Dean]." *Id.* at 20. Jones Day concluded that "the explanations provided ... by
21 the responsible leaders of the School do not provide a persuasive justification for not
22 reporting EdD data." *Id.* at 3.

23 Jones Day assigned full responsibility for this course of conduct to USC: "The
24 ultimate decision-making authority and responsibility for the School's survey
25 submissions rested with the School's dean, who reviewed and approved the
26

27 ² When USC Rossier participated in the program-specific "Best Online Master's in
28 Education" rankings in 2013, US News ranked its online MAT program #44.
Compl. ¶ 68.

1 submissions before they were transmitted to US News.” *Id.* The Jones Day Report
 2 does not mention 2U.

3 **D. Plaintiffs’ Allegations**

4 On December 20, 2022, Plaintiffs Iola Favell, Sue Zarnowski, and Mariah
 5 Cummings, former online USC Rossier students, filed suit against USC and 2U on
 6 behalf of themselves and other former USC Rossier online students. Plaintiffs allege
 7 that “Defendants engaged in a two-part scheme” to (1) “submit[] inaccurate,
 8 incomplete data to US News to increase USC Rossier’s Best Education Schools
 9 ranking,” and (2) “use[] the[] fraudulently-procured Best Education Schools ranking
 10 to market the online degrees, all the while withholding data from those online
 11 degrees that would have affected their rankings.” Compl. ¶ 50.

12 Nearly all of Plaintiffs’ allegations are made broadly about “Defendants,”
 13 without identifying any specific conduct by 2U. As for 2U in particular, Plaintiffs
 14 allege that 2U “acted in concert with” USC to “aggressively advertise[] USC
 15 Rossier’s fraudulent rankings to grow enrollment in the school’s online programs.”
 16 *Id.* ¶ 2; *see also id.* ¶ 75 (“USC carried out this [advertising] campaign, both on its
 17 own, and through its partner and agent, 2U”). Plaintiffs assert that 2U “knew” that
 18 USC posted advertisements touting the USC Rossier rankings and that 2U was
 19 “consulted” on those advertisements. *Id.* ¶¶ 82-83. According to Plaintiffs, the
 20 supposedly misleading rankings were primarily promoted on two websites—USC’s
 21 “main Rossier website” (rossier.usc.edu) (the “**USC Rossier Website**”) and the
 22 Rossier Online Webpage “specific to the online degrees” (rossieronline.usc.edu) (the
 23 “**USC Rossier Online Webpage**”). *Id.* ¶¶ 45, 82, 84. Plaintiffs also allege that 2U
 24 used “paid online advertising to expand the reach of USC Rossier’s rankings to more
 25 prospective students.” *Id.* ¶ 77. Plaintiffs then claim that they would not have “paid
 26 tuition”—or would have paid “substantially less”—but for “USC Rossier’s
 27 fraudulently obtained US News ranking.” *Id.* ¶ 10.

1 Plaintiffs bring equitable claims under California’s False Advertising Law
 2 (“**FAL**”), Cal. Civ. Code § 17500; Consumers Legal Remedies Act (“**CLRA**”), Cal.
 3 Civ. Code § 1770; and Unfair Competition Law (“**UCL**”), Cal. Civ. Code § 17200;
 4 as well as for unjust enrichment. *See* Compl. ¶¶ 147-78. Each claim is based on
 5 Defendants’ allegedly false and deceptive advertising promoting US News’s high
 6 ranking of USC Rossier. *See id.* ¶ 148 (FAL); *id.* ¶ 156 (UCL); *id.* ¶ 165 (CLRA);
 7 *id.* ¶ 170 (unjust enrichment). Plaintiffs also say that they intend to amend their
 8 Complaint to add a claim for damages pursuant to the CLRA. *Id.* ¶ 167.

9 **III. LEGAL STANDARDS**

10 A court must dismiss claims under Rule 12(b)(6) where a plaintiff fails to
 11 allege “factual content that allows the court to draw the reasonable inference that the
 12 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 13 (2009). Plaintiffs’ allegations are taken as true on a Rule 12(b)(6) motion, but a
 14 court need not accept “legal conclusion[s] couched as [] factual allegation[s],” and
 15 “[t]hreadbare recitals of the elements of a cause of action, supported by mere
 16 conclusory statements, do not suffice.” *Id.* (citation omitted).

17 Rule 9(b) further requires that fraud-based claims “state with particularity the
 18 circumstances constituting [the] fraud.” Fed. R. Civ. P. 9(b). Under that standard,
 19 Plaintiffs “must identify the who, what, when, where, and how of the misconduct
 20 charged, as well as what is false or misleading about the purportedly fraudulent
 21 statement, and why it is false.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956,
 22 964 (9th Cir. 2018) (citation omitted). Group pleading is improper; instead, Rule
 23 9(b) requires that a plaintiff “inform each defendant separately of the allegations
 24 surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d
 25 756, 764-65 (9th Cir. 2007) (citation omitted); *see also Hilsley v. General Mills*, 376
 26 F. Supp. 3d 1043, 1051 (S.D. Cal. 2019) (dismissing claims against advertiser
 27 defendants where plaintiffs did not explain their participation in the misconduct); *In*
 28 *re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs. & Prods. Liab.*

1 *Litig.*, 826 F. Supp. 2d 1180, 1201 (C.D. Cal. 2011) (dismissing complaint that
2 “impermissibly ascrib[ed] conduct to ... ‘Defendants’ generally”).

3 Here, all four of Plaintiffs’ claims sound in fraud and therefore must meet
4 Rule 9(b)’s heightened bar. Plaintiffs themselves admit that the heart of their case
5 is *fraud*. *See, e.g.*, Compl. ¶ 2 (“This Complaint centers on that rankings fraud.”);
6 *id.* (“[F]raud is exactly what happened here.”); *id.* ¶ 95 (“Defendants’ fraudulent
7 scheme to climb the US News rankings has benefited them tremendously[.]”).
8 Indeed, each of Plaintiffs’ claims is ultimately based on alleged “misrepresentations”
9 about USC Rossier’s “true” US News ranking, and misrepresentations are a “species
10 of fraud.” *Meridian Project Sys. v. Hardin Constr. Co.*, 404 F. Supp. 2d 1214, 1219
11 (E.D. Cal. 2005); *see Davidson*, 889 F.3d at 964 (holding that FAL, UCL, and CLRA
12 claims based on misrepresentations were all grounded in fraud); *Puri v. Khalsa*, 674
13 F. App’x 679, 690 (9th Cir. 2017) (dismissing an unjust enrichment claim based on
14 fraudulent conduct for failure to satisfy Rule 9(b)). And because each of Plaintiffs’
15 claims is based on the same underlying fraud-based conduct, each may be
16 considered—and disposed of—together. *See, e.g., Kearns v. Ford Motor Co.*, 567
17 F.3d 1120, 1125 (9th Cir. 2009) (considering misrepresentation-based UCL and
18 CLRA claims together and affirming dismissal of both for failure to meet Rule 9(b));
19 *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 854 (N.D. Cal. 2012) (“[C]ourts
20 often analyze these three statutes [the FAL, UCL, and CLRA] together.”).

21 **IV. ARGUMENT**

22 All of Plaintiffs’ claims against 2U must be dismissed. *First*, Plaintiffs fail to
23 plead essential elements of their FAL, UCL, and CLRA claims. *Second*, *Sonner v.*
24 *Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020), bars all of Plaintiffs’ claims
25 because they are for equitable relief, and yet Plaintiffs have not pled that legal
26 remedies would be inadequate. *Finally*, Plaintiffs’ unjust enrichment claim
27 additionally fails because unjust enrichment is not a cause of action in California,
28 and, in any case, Plaintiffs have not stated a claim for restitution.

A. Plaintiffs Fail To Properly Allege Their Misrepresentation-Based Claims Against 2U

Plaintiffs’ misrepresentation-based allegations under the FAL, UCL, and CLRA do not state a claim under Rule 8’s plausibility standard, much less under the heightened bar of Rule 9(b). Plaintiffs claim “Defendants” posted the “falsified US News ranking” and made statements that USC Rossier was “top-ranked” on: (1) the main homepage of the USC Rossier Website, *rossier.usc.edu*, Compl. ¶¶ 79, 82-84, 106, 117, 130; and (2) the Rossier Online Webpage specific to the online degrees, *rossieronline.usc.edu*, *id.* ¶ 84. They also claim that 2U generated interest in USC Rossier’s online programs using “paid search result advertisements” on Google, “targeted advertising on Facebook,” and “additional advertising” on unrelated sites “via a display advertising network.” *Id.* ¶¶ 115-116, 118, 131-132.

None of these allegations states a claim against 2U, because none is supported by factual allegations that establish the required elements of these misrepresentation-based claims. Most importantly, Plaintiffs fail to plead: (1) that 2U knew that the statements were false, (2) that the statements are actionable, or (3) that 2U made any of the statements on which Plaintiffs allegedly relied. 2U has nothing to do with USC’s alleged misconduct, and it should never have been made part of this case.

1. Plaintiffs Have Not Alleged 2U Knew Any Of The Statements Were False

All of Plaintiffs’ misrepresentation-based claims require proof that 2U *knew* the statements were false. The UCL and CLRA require proof that the defendant has actual knowledge of falsity. *See, e.g., Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir. 2012); *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1160-63 (N.D. Cal 2011). The FAL requires proof of constructive knowledge, which allows liability only if the plaintiff can show that the facts “should be known” by the defendant through the “exercise of reasonable care.” Cal. Civ. Code § 17500. Here, Plaintiffs have failed to plead knowledge under either test. Simply put, 2U

1 had no actual or constructive knowledge that USC Rossier’s rankings were allegedly
 2 based on incomplete data because *USC*—not 2U—submits survey responses and
 3 program data to US News. Plaintiffs cannot plead around this problem by lumping
 4 “Defendants” together using impermissible group pleading.

5 Although knowledge may be averred “generally” under Rule 9(b), a plaintiff
 6 still must allege “sufficient facts to support ... or render plausible” an inference of
 7 knowledge as to each defendant. *United States v. Corinthian Colleges*, 655 F.3d
 8 984, 997 (9th Cir. 2011); *In re Hydroxycut Mktg. & Sales Pracs. Litig.*, 299 F.R.D.
 9 648, 659 (S.D. Cal. 2013) (citation omitted) (dismissing fraud claims because
 10 plaintiff did not “plead circumstances providing a factual basis for scienter for each
 11 defendant”). Plaintiffs have entirely failed to do so here. Plaintiffs simply assert
 12 that “Defendants knew the data submissions [to US News] were fraudulent” and
 13 therefore “knew or should have known that the representations were untrue or
 14 misleading.” Compl. ¶¶ 141, 151. But these group allegations do not specify that
 15 2U had that knowledge—or how and when it was acquired. They are too speculative
 16 and conclusory to meet Plaintiffs’ burden. *See, e.g., In re Samsung Galaxy*
 17 *Smartphone Mktg. & Sales Pracs. Litig.*, No. 16-cv-06391-BLF, 2020 WL 7664461,
 18 at *8 (N.D. Cal. Dec. 24, 2020) (“merely conclusory” allegations of knowledge
 19 insufficient); *Spencer v. Cal. Bus. Bur., Inc.*, No. 16-cv-0399-AJB, 2016 WL
 20 11779144, at *6 (S.D. Cal. Aug. 16, 2016) (rejecting conclusory allegations that
 21 defendant “knew or should have known”).

22 Plaintiffs’ speculative group allegations, in any event, are not even plausible
 23 as applied to 2U. Plaintiffs have not alleged that 2U submitted survey responses or
 24 program data to US News, such that 2U could have been on notice that USC had
 25 submitted allegedly incomplete responses to US News’s questions. To the contrary,
 26 the Complaint and the documents it incorporates underscore the lack of *any*
 27 connection between 2U and this supposed fraud.

28

For example, Plaintiffs’ allegations of ranking-related fraud rely exclusively on the Jones Day Report. *See* Compl. ¶¶ 1, 49, 58, 60, 67, 69-73. But the Jones Day Report makes clear that USC submitted data to US News, and it states that “[t]he ultimate decision-making authority and responsibility for the School’s survey submissions [to US News] rested with the School’s dean.” Ex. 3 at 1; *see also id.* at 7 (“Dean 1 reviewed and approved the School of Education’s 2001 through 2020 survey submissions to US News,” and “Dean 1 directed the exclusion of EdD from selectivity metrics”); *id.* at 10 (“Dean 1 directed School Administrator 1 and the Rankings Staff Member to continue to exclude EdD data from responses”); *id.* at 20 (noting Dean 1’s “decision” not to submit online program data); *see, e.g., In re Eventbrite, Inc. Secs. Litig.*, No. 5:18-cv-02019-EJD, 2020 WL 2042078, at *7 (N.D. Cal. Apr. 28, 2020) (documents incorporated by reference may be considered on motion to dismiss). The Jones Day Report *never* references 2U and certainly does not suggest 2U knew (or should have known) of USC’s alleged misconduct. The contract between USC and 2U, moreover, says nothing about any ranking process, and does not provide 2U with authority to submit data to US News on USC’s behalf or even review USC’s submissions. *See* Ex. 1.

The rest of Plaintiffs’ allegations likewise confirm that USC alone was responsible for submitting data to US News. *See, e.g.,* Compl. ¶ 19 (“USC ... submitted data” to US News); *id.* ¶ 67 (“USC [did] not provid[e] US News with any selectivity data from its online programs”); *id.* ¶ 71 (“[Dean 2] again authorized the submission of survey data to US News that excluded EdD data”). Indeed, Plaintiffs do not allege that 2U even had access to information from which it could or should have discovered issues with USC’s submissions. *See, e.g., Wilson*, 668 F.3d at 1147 (declining to credit allegations that defendant was “on notice” of problems through its “access to aggregate data”).

That 2U played no role in the alleged fraud is fatal to Plaintiffs’ claims under any pleading standard, and especially Rule 9(b). *See, e.g., Swartz*, 476 F.3d at 764-

65 (citation omitted) (plaintiff must “inform each defendant separately of the allegations surrounding his alleged participation in the fraud”). Because Plaintiffs have not pled any facts from which to plausibly infer that 2U knew of the alleged issues with the US News rankings, its statutory claims against 2U must be dismissed. *See, e.g., In re Hydroxycut Mktg. & Sales Pracs.*, 299 F.R.D. at 659.

2. Plaintiffs Do Not Allege Any Actionable Misstatements Or Omissions

Plaintiffs have not pled a single actionable misstatement or omission, which is required for each of Plaintiffs’ misrepresentation-based claims. *See Hodsdon v. Mars, Inc.*, 891 F.3d 857, 865 (9th Cir. 2018) (affirming dismissal of FAL, UCL, and CLRA claims for failure to plead an actionable misstatement or omission). Only “specific factual assertion[s]” that are capable of being proven false are actionable. *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005); *see also Edmundson v. Proctor & Gamble Co.*, 537 F. App’x 708, 709 (9th Cir. 2013) (dismissing false advertising-based UCL and CLRA claims). Plaintiffs allege two categories of purported misrepresentations: (1) statements that USC Rossier was “top-ranked,” *see, e.g.,* Compl. ¶¶ 82, 83; and (2) statements that reposted the numerical US News rank USC Rossier held at the time of the advertising, *see, e.g., id.* ¶ 83. Neither states a claim, whether considered under an affirmative misrepresentation theory or as the basis of Plaintiffs’ related omissions theory.

a. Plaintiffs’ Affirmative Misstatement Theory Fails

Affirmative statements that USC Rossier was “top-ranked”—without reference to any objective basis for that claim—are nonactionable “puffery.” *See, e.g., Edmundson*, 537 F. App’x at 709; *McLaughlin v. Homelight, Inc.*, No. 2:21-cv-05379-MCS, 2021 WL 5986913, at *4 (C.D. Cal. Sept. 17, 2021) (holding that a list of “top” real estate agents a website compiled using both subjective and objective measures was “nonactionable puffery too nebulous and ambiguous to support a claim of false advertising”) (collecting cases where “top”-based statements

1 constituted puffery). “Advertising which merely states in general terms that one
 2 product is superior is not actionable” because “consumer reliance” is induced by
 3 “specific rather than general assertions.” *Viggiano v. Hansen Nat. Corp.*, 944 F.
 4 Supp. 2d 877, 894 (C.D. Cal. 2013). Here, statements that USC Rossier was “top-
 5 ranked” are too general to be actionable because they say nothing about the school’s
 6 “specific characteristics,” and ultimately are no “more weighty than an advertising
 7 slogan.” *Elias*, 903 F. Supp. 2d at 855 (citation omitted); *see also Fowler v. Univ.*
 8 *of Phoenix, Inc.*, No. 18-cv-1544-WQH, 2019 WL 1746576, at *12 (S.D. Cal. Apr.
 9 18, 2019) (statements regarding the “quality of education” are mere puffery).

10 Advertising statements noting USC Rossier’s numerical US News ranking are
 11 not actionable either. Plaintiffs claim that USC Rossier’s US News rankings were
 12 inflated as a result of USC’s incomplete survey submissions, and that “Defendants”
 13 committed fraud by including those rankings in their marketing materials. *See, e.g.*,
 14 Compl. ¶ 84. But each statement noting USC Rossier’s numerical US News ranking
 15 was *literally true*, and 2U cannot be held liable for “presenting accurately [US
 16 News’s] allegedly inaccurate conclusions” about USC Rossier. *Biolase, Inc. v.*
 17 *Fotona Proizvodnja Optoelektronskih Naprav D.D.*, No. 14-0248-AG, 2014 WL
 18 12579802, at *4 (C.D. Cal. June 4, 2014) (citation omitted). Although Plaintiffs take
 19 issue with the data underlying the US News rankings, it is entirely undisputed that
 20 US News *did* give USC Rossier the precise ranking advertised, which provided 2U
 21 with a factual basis for any marketing materials it developed containing those
 22 rankings. *See, e.g., Royal Holdings Techs. Corp. v. FLIR Sys., Inc.*, No. 2:20-cv-
 23 09015-SB, 2021 WL 945246, at *6 (C.D. Cal. Jan. 8, 2021) (finding no liability for
 24 alleged misuse of a truthful statement). Simply reposting the US News rankings,
 25 without more, is neither false nor a misrepresentation of US News’s subjective
 26 conclusions about USC Rossier. *See Express Gold Cash, Inc. v. Beyond 79, LLC*,
 27 No. 1:18-cv-00837-EAW, 2019 WL 4394567, at *6 (W.D.N.Y. Sep. 13, 2019)

28

(holding that statements that defendant was “ranked #1 by NBC’s Today Show” could not form basis of false advertising claim where literally true).

To the extent Plaintiffs argue that the US News rankings *themselves* were the false advertising, that fails too. Setting aside that Defendants did not make the rankings (and that 2U did not contribute to them in any way), US News’s rankings are statements of opinion, not fact. *See Ariix*, 985 F.3d at 1121. In *Ariix*, the Ninth Circuit explained that although “publications that rank colleges or law schools purportedly rely on objective criteria (*e.g.*, acceptance rates, test scores, class size, endowment),” selecting those criteria “involves subjective decision-making.” *Id.* The product thus is an “unquantifiable assertion,” which is a “classic” example of a “non-actionable opinion[]” that cannot form the basis for a fraud claim. *Id.* (citation omitted). So too here. US News uses “subjective decision-making” to form its Best Education School rankings. *Id.* But that “subjective decision-making,” which encompasses the decision whether to weigh data from online or EdD programs in its selectivity indicators, renders its rankings an “unquantifiable assertion[]” that cannot give rise to a fraud claim. *Id.*; *see also ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 796-801 (N.D. Cal. 2010) (ranking software companies was a non-actionable opinion, and defendant had no duty to disclose the basis for the rankings).

b. Plaintiffs’ Omissions Theory Fails

Plaintiffs half-heartedly attempt to recast their affirmative-misstatement claim under an omissions theory, briefly asserting that Defendants are liable for failing to disclose three things on USC’s websites: USC Rossier’s “lower (or non-existent) position in US News’s rankings of online master’s degrees in education,” Compl. ¶ 85; “that the data used to obtain the US News ranking excluded EdD students, both online and in person,” *id.* ¶ 86; and “things like selectivity information, or average GRE scores,” *id.* ¶ 86. This omissions theory is equally meritless.

In the absence of an affirmative and contrary misrepresentation, Plaintiffs must plead with particularity that the defendant omitted a “fact the defendant was

1 obliged to disclose.” *Hodsdon*, 891 F.3d at 861 (citation omitted). The duty to
 2 disclose in the absence of a contrary affirmative misrepresentation is narrow:
 3 “California courts have generally rejected a broad obligation to disclose.” *Wilson*,
 4 668 F.3d at 1141 (citing *Daugherty v. Am. Honda Co.*, 144 Cal. App. 4th 824, 835
 5 (2006)). That duty extends only to facts that are “material” and relate to the “central
 6 functionality” of the product or service at issue. *Id.* at 863. In addition, the defendant
 7 must bear a special responsibility to disclose the information under the factors set
 8 forth in *LiMandri v. Judkins*, 52 Cal. App. 4th 326 (1997). *See, e.g., Sud v. Costco*
 9 *Wholesale Corp.*, 731 F. App’x 719, 720 (9th Cir. 2019) (requiring that a plaintiff
 10 allege central functionality and a *LiMandri* factor). Here, Plaintiffs’ omission theory
 11 fails because there is no duty to disclose information about USC Rossier’s US News
 12 ranking or the selectivity of the online programs, for two reasons: (1) these purported
 13 omissions do not relate to the “central functionality” of a USC education, and (2) 2U
 14 had no responsibility to disclose this information under *LiMandri*.

15 *First*, Plaintiffs nowhere allege that the purported omissions were so
 16 important that they affected the “central functionality” of their USC education.
 17 Under this test, a company’s failure to disclose information about its product or
 18 service is not actionable unless the omitted information rendered the product or
 19 service “incapable of use.” *Hodsdon*, 891 F.3d at 864 (explaining “central
 20 functionality” doctrine under *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249
 21 (2011), and *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164 (2015)). This
 22 bright-line rule is “sound policy,” given the “difficulty of anticipating exactly what
 23 information some customers might find material to their purchasing decisions,” *Sud*
 24 *v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1086 (N.D. Cal. 2017), and the
 25 fact that “courts are not suited to determine which [information] must occupy the
 26 limited surface area” of a brochure or other marketing material, *Dana v. Hershey*
 27 *Co.*, 180 F. Supp. 3d 652, 665 (N.D. Cal. 2016). California law thus requires that
 28 the omitted information “obliterate” the function of the product or service such that

1 it becomes “unusable” in order to impose a duty to disclose it. *Ahern v. Apple Inc.*,
 2 411 F. Supp. 3d 541, 568 (N.D. Cal. 2019); *see also Knowles v. Arris Int’l PLC*, No.
 3 17-CV-01834-LHK, 2019 WL 3934781, at *16 (N.D. Cal. Aug. 20, 2019) (finding
 4 no centrality where latency defects slowed down performance but did not render a
 5 modem unusable).

6 Here, as discussed, Plaintiffs fault USC and 2U for failing to disclose USC
 7 Rossier’s “lower (or non-existent) position in US News’s rankings of online master’s
 8 degrees in education,” Compl. ¶ 85; “that the data used to obtain the US News
 9 ranking excluded EdD students,” *id.* ¶ 86; and “things like selectivity information,
 10 or average GRE scores,” *id.* ¶ 86. But none of this information has any bearing on
 11 the education and graduate degrees that Plaintiffs actually received. Plaintiffs’
 12 “subjective preferences” about how US News, a third party, ranked USC Rossier
 13 (based on its own subjective assessment of selectivity data) simply did not affect the
 14 educational instruction they actually received, let alone render those services
 15 “incapable of use.” *Hodsdon*, 891 F.3d at 864; *Hall v. SeaWorld Ent., Inc.*, 747 F.
 16 App’x 449, 451 (9th Cir. 2018) (affirming no duty to disclose information on orca
 17 treatment where it did not relate to the central function of Seaworld’s services, but
 18 instead reflected “Plaintiffs’ ‘subjective preferences’” on how orcas were treated).
 19 Nor did Plaintiffs’ subjective preferences about USC Rossier’s *voluntary*
 20 participation in different US News rankings (or ranking inputs like admission rates
 21 or average GRE scores of other students in particular years) in any way affect the
 22 education Plaintiffs received or the degrees they earned. Plaintiffs’ omission
 23 theories do not meet the high “central functionality” bar and accordingly fail.

24 *Second*, and independently, 2U had no duty to disclose any of this information
 25 because Plaintiffs fail to adequately allege any *LiMandri* factor. Under California
 26 law, a duty to disclose material facts relating to the central function of a good or
 27 service arises only in four instances: “(1) when the defendant is the plaintiff’s
 28 fiduciary; (2) when the defendant has exclusive knowledge of material facts not

1 known or reasonably accessible to the plaintiff; (3) when the defendant actively
 2 conceals a material fact from the plaintiff; and (4) when the defendant makes partial
 3 representations that are misleading because some other material fact has not been
 4 disclosed.” *Hodsdon*, 891 F.3d at 862 (citing *LiMandri*, 52 Cal. App. 4th at 336).

5 Plaintiffs do not allege that any of these four circumstances are present here.
 6 Plaintiffs nowhere allege that 2U was their fiduciary (nor could they). Plaintiffs also
 7 do not (and cannot) allege that 2U had knowledge—let alone “exclusive
 8 knowledge”—of either (1) the fact that USC Rossier was not included in US News’s
 9 specialized “Best Online Master’s in Education” ranking for many years (which
 10 could have been ascertained by visiting US News’s website); or (2) the data behind
 11 USC Rossier’s US News rankings (which USC compiled and submitted). *Id.*; see
 12 *Elias v. Hewlett-Packard Co.*, 950 F. Supp. 2d 1123, 1138-39 (N.D. Cal. 2013)
 13 (dismissing claims that defendant concealed or suppressed information it did not
 14 know). As for the allegedly omitted “selectivity information” on the online
 15 programs, that also fails. Compl. ¶ 86. Plaintiffs’ own allegations that USC should
 16 have submitted selectivity data about the online programs to US News, see Compl.
 17 ¶ 6, belies any argument that 2U had “exclusive knowledge” of that data. Moreover,
 18 Plaintiffs have not alleged a single fact to support an inference that 2U actively
 19 concealed this information. See *Milman v. FCA U.S., LLC*, No. 18-00686-JVS, 2018
 20 WL 5867481, at *11 (C.D. Cal. Aug. 30, 2018) (dismissing omission-based claims
 21 centered on “mere nondisclosure”). Finally, because Plaintiffs have failed to plead
 22 that any affirmative representation by 2U is actionable, they “cannot proceed on the
 23 basis of misleading partial representations.” *Kavehrad v. Vizio, Inc.*, No. 8:21-cv-
 24 01868-JLS, 2022 WL 16859975, at *6-7 (C.D. Cal. Aug. 11, 2022) (dismissing
 25 omissions claims where affirmative representations were puffery). Without a duty
 26
 27
 28

1 to disclose, Plaintiffs’ omissions-based theory against 2U must be rejected.³

2 3. Plaintiffs Fail To Allege That 2U Made An Actionable
 3 Misstatement Or Omission On Which They Relied

4 Plaintiffs’ claims against 2U also fail for multiple additional reasons. 2U did
 5 not make any of the allegedly misleading statements on the main USC Rossier
 6 Website. 2U also did not exert “unbridled control” over the statements on USC
 7 Rossier’s *Online* Webpage—and, in any event, Plaintiffs did not allege they relied
 8 on statements made there. Finally, 2U’s commonplace marketing techniques are not
 9 false or misleading statements of fact, and Plaintiffs do not identify with particularity
 10 any misleading advertisement that resulted from those techniques.

11 a. Plaintiffs Have Not Alleged That 2U Made Any
 12 Statements On The USC Rossier Website

13 A defendant may not be held liable for false advertising and unfair
 14 competition claims “absent its ‘*personal participation* in the unlawful practices and
 15 *unbridled control* over th[ose] practices.’” *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*,
 16 494 F.3d 788, 808-09 (9th Cir. 2007) (emphasis added) (quoting *Emery v. Visa Int’l*
 17 *Serv. Ass’n*, 95 Cal. App. 4th 952, 960 (2002)) (dismissing UCL and FAL claims);
 18 *see also In re Jamster Mktg. Litig.*, No. 05-cv-0819-JM, 2009 WL 1456632, at *8
 19 (S.D. Cal. May 22, 2009) (same for CLRA). As California courts have made clear,
 20 “there is no duty to investigate the truth of statements made by others.” *Emery*, 95
 21 Cal. App. 4th at 964. Rather, the defendant must have “exercised [] control over the
 22 preparation or distribution of” a statement to be liable for a misrepresentation
 23 contained within that statement. *Id.* at 960.

24 Here, Plaintiffs do not allege that 2U made any of the statements on the USC

25 ³ Plaintiffs briefly suggest that 2U advisors failed to disclose their affiliation with
 26 2U, *see, e.g.*, Compl. ¶¶ 47, 119, but do not allege either that 2U advisors
 27 affirmatively represented their affiliation or had a duty to disclose more. And while
 28 Plaintiffs claim that *they* made rankings-related statements to their advisors, they do
 not allege that the *advisors* made any such statements or had a duty to disclose
 anything about third-party rankings of USC Rossier. *See Hodsdon*, 891 F.3d at 862.

Rossier Website. On the contrary, they expressly acknowledge the opposite, declaring that “USC maintained the main Rossier website, rossier.usc.edu.” Compl. ¶ 45 (emphasis added); *see also* Ex. 1 at 2(A). That is fatal to their claims against 2U based on these webpages. *See, e.g., Emery*, 95 Cal. App. 4th at 960.⁴

To be sure, Plaintiffs assert that USC displayed rankings on the USC Rossier Website “with 2U’s consultation,” Compl. ¶ 83, but that is not enough to state a claim against 2U. Mere “consultation”—without “unbridled control”—is plainly insufficient for liability. *Perfect 10*, 494 F.3d at 808-09 (citation omitted); *see also Tortilla Factory, LLC v. Health-Ade LLC*, No. 17-9090-MWF, 2018 WL 6174708, at *11 (C.D. Cal. July 13, 2018) (same). Indeed, courts have recognized that a general agreement to “collaborate on a website” is not enough to allege “direct involvement” in curating its content, such that a defendant would be liable for any misrepresentations made there. *Woodard v. Labrada*, No. 16-0189-JGB, 2017 WL 1018307, at *12 (C.D. Cal. Mar. 10, 2017).

b. Plaintiffs’ Allegations Based On The USC Rossier Online Webpage Do Not State A Claim

Plaintiffs also allege that 2U and USC shared responsibility for a *different* website specific to the online degrees, the USC Rossier Online Webpage located at rossieronline.usc.edu, and that *this* webpage fraudulently included USC Rossier’s numerical US News rankings, as well as statements that the school was “top-ranked.” Compl. ¶¶ 45, 84, 86. These claims fare no better.

As noted, California consumer protection law imposes liability for false or misleading statements only when the defendant exercises “unbridled control” over the content of those statements. *Perfect 10*, 494 F.3d at 808 (quoting *Emery*, 95 Cal. App. 4th at 960). Here, though, USC exercised ultimate control over the USC Rossier Online Webpage, not 2U. As the contract between 2U and USC made clear,

⁴ The same is true for any claims based on news releases “USC published” and “authored,” Compl. ¶ 79, and tweets posted by USC or its Dean, *id.* ¶¶ 80-81, which, in any event, Plaintiffs do not claim to have seen or relied on, *see infra*.

1 *all* of 2U’s marketing materials pertaining to the online programs, including
 2 materials that ended up on the USC Rossier Online Webpage, were “subject to
 3 USC’s written approval prior to any use.” Ex. 1 at 1(A) (emphasis added).

4 In any event, Plaintiffs have not pled an actionable claim based on the USC
 5 Rossier Online Webpage because Plaintiffs do not allege that they relied on any false
 6 or misleading statements made on that webpage. Reliance is a required element for
 7 Plaintiffs’ FAL, UCL, and CLRA claims based on fraud or misrepresentation.⁵
 8 *Kwan v. SanMedica Int’l*, 854 F.3d 1088, 1095 (9th Cir. 2017); *see also Kwisket*
 9 *Corp. v. Superior Ct.*, 51 Cal. 4th 310, 322 (2011) (same). Reliance “is proved by
 10 showing that [the] defendant’s misrepresentation is an ‘immediate cause’ of the
 11 plaintiff’s conduct,” which means that “the plaintiff ‘in all reasonable probability’
 12 would not have engaged in the injury-producing conduct” if the misrepresentation
 13 had not been made. *Kwan*, 854 F.3d at 1095 (citations omitted).

14 Here, Plaintiffs do not allege that they saw—let alone relied on—a single
 15 representation made on the USC Rossier Online Webpage. Indeed, Plaintiffs make
 16 clear that the “[s]pecific misrepresentations and omissions on which the[y] relied are
 17 set forth” in paragraphs 105-132 of the Complaint, Compl. ¶ 150, yet those
 18 paragraphs never mention any statement that appeared on the USC Rossier Online
 19 Webpage. Needless to say, a plaintiff cannot rely on an alleged misrepresentation
 20 to which she was not exposed. *See, e.g., Schwartz v. Bai Brands, LLC*, No. 19-
 21 06249-SPG, 2022 WL 16935267, at *7 (C.D. Cal. Aug. 19, 2022) (dismissing FAL,
 22 UCL, and CLRA claims where the plaintiff did not allege that they saw the relevant
 23 advertisements prior to purchase).⁶

24 ⁵ Plaintiffs’ lack of reliance is also fatal to Plaintiffs’ statutory standing under the
 25 FAL, UCL, and CLRA. *See Rothman v. Equinox Holdings, Inc.*, No. 2:20-cv-09760-
 CAS, 2021 WL 124682, at *4-6 (C.D. Cal. Jan. 13, 2021).

26 ⁶ Plaintiffs fail to plead reliance on the purported omissions for the same reason. To
 27 prove reliance, Plaintiffs must plead that “had the omitted information been
 28 disclosed, [they] would have been aware of it and behaved differently.” *Daniel v.*
Ford Motor Co., 806 F.3d 1217, 1225 (9th Cir. 2015) (citation omitted). But because

c. Plaintiffs' Allegations About 2U's Use Of Search Engine Optimization Do Not State A Claim

Finally, Plaintiffs do not state a claim based on 2U's search-engine optimization techniques, such as purchasing Google search terms and targeted advertisements on Facebook, and disseminating advertisements on other sites via a display advertising network. Compl. ¶¶ 115-16, 118, 131-32. The first element of each of Plaintiffs' misrepresentation-based claims is a false or misleading *statement* of fact, *see, e.g., Edmundson*, 537 F. App'x at 709, but search engine techniques and marketing strategies do not constitute "statements" in any sense of the term. *See, e.g., GhostBed, Inc. v. Casper Sleep, Inc.*, No. 15-cv-62571-WPD, 2018 WL 2213002 at *7 (S.D. Fla. May 3, 2018) (holding as a matter of law that search engine techniques and marketing strategies do not constitute "statements" on which a false advertising claim can be based).

Nor do Plaintiffs state a claim based on the advertisements that resulted from 2U's use of these commonplace marketing techniques. Crucially, Plaintiffs do not identify the advertisements they saw or the links they clicked on. *See* Compl. ¶¶ 115-16, 118, 131-32. That lack of specificity is fatal under Rule 9(b). *See, e.g., Kearns*, 567 F.3d at 1126 (dismissing where plaintiff did not specify the advertisements he saw, when he saw them, or which was material); *In re Apple Inc. Device Performance Litig.*, 347 F. Supp. 3d 434, 458 (N.D. Cal. 2019) (generally alleging an advertising campaign fails to plead "with particularity" the "statements [plaintiffs] ... actually saw and relied upon"). In addition, Plaintiffs again fail to allege that 2U made any of the alleged misrepresentations. *See BHRS Grp., LLC v.*

Plaintiffs do not allege that they ever viewed the USC Rossier Online Webpage, they likewise have not alleged that they would have seen "selectivity information, or average GRE scores," Compl. ¶ 86, had it been posted there. *Daniel*, 806 F.3d at 1225; *see also Barrett v. Apple Inc.*, 523 F. Supp. 3d 1132, 1151-53 (N.D. Cal. 2021) (dismissing omissions-based claims for lack of causation). Plaintiffs also do not allege—even in conclusory terms—that they would have behaved differently if they saw this information. *Daniel*, 806 F.3d at 1225.

1 *Brio Water Tech., Inc.*, 553 F. Supp. 3d 793, 799-801 (C.D. Cal. 2021) (dismissing
2 false advertising claim absent allegation the defendant made the misstatement).

3 * * *

4 In the end, Plaintiffs’ fraud claims rest entirely on their theory that *USC* made
5 misleading statements to US News to enhance USC Rossier’s ranking. But 2U is
6 not responsible for this alleged misconduct. Indeed, Plaintiffs’ own sources make
7 clear that 2U did not participate in the US News survey process or submit program
8 data to US News. Plaintiffs have no basis for dragging 2U into this case based on
9 USC’s allegedly deceptive conduct.

10 **B. All Of Plaintiffs’ Claims Are Barred By *Sonner***

11 All of Plaintiffs’ claims must also be dismissed under the Ninth Circuit’s
12 decision in *Sonner* because Plaintiffs have not “establish[ed]” that they “lack[] an
13 adequate legal remedy,” as they must to pursue an equitable claim in federal court.
14 971 F.3d at 844. That rule applies even if the state’s own courts could provide
15 equitable relief without satisfying those principles. *See id.* Here, Plaintiffs’ claims
16 are all equitable in nature. *See, e.g., Madrigal v. Hint, Inc.*, No. 17-02095-VAP,
17 2017 WL 6940534, at *5 (C.D. Cal. Dec. 14, 2017) (discussing FAL, UCL, CLRA
18 and unjust enrichment claims); *see also Guzman v. Polaris Indus. Inc.*, 49 F.4th
19 1308, 1313 (9th Cir. 2022) (citation omitted) (noting “[t]he UCL provides only for
20 equitable remedies”). Plaintiffs therefore cannot pursue these claims unless they
21 “establish” that they lack “an adequate legal remedy.” *Sonner*, 971 F.3d at 844.

22 Plaintiffs have not and cannot do so, as they implicitly concede by announcing
23 their intent to seek money damages under the CLRA. *See* Compl. ¶ 167 (conceding
24 damages are available under the CLRA); Ex. 4 at 1 (requesting damages in the form
25 of tuition reimbursement for alleged CLRA violations). Plaintiffs’ theories of
26 harm—which are based on the exact same course of conduct—are *entirely* monetary;
27 indeed, the primary form of relief they seek is tuition reimbursement. *See* Compl. ¶
28 166 (alleging that Plaintiffs suffered “monetary losses in the form of tuition and fees

1 that they paid in full or at a premium” in connection with CLRA claim); *see also id.*
 2 ¶ 153 (seeking return of “all monies paid” by Plaintiffs and class members for FAL
 3 claim); *id.* ¶ 161 (same for UCL); *id.* ¶ 173 (similar for unjust enrichment). Because
 4 adequate legal remedies exist for Plaintiffs’ purported harm, these requests for
 5 equitable relief must be dismissed. *See, e.g., Guzman*, 49 F.4th at 1312-15
 6 (affirming dismissal of UCL claim where the plaintiff had adequate legal remedies
 7 under the CLRA); *Gomez v. Jelly Belly Candy Co.*, No. 17-00575-CJC, 2017 WL
 8 8941167, at *2 (C.D. Cal. Aug. 18, 2017) (dismissing FAL, UCL, and equitable
 9 CLRA claim “based on the exact same conduct” as the plaintiff’s damages claims).

10 Plaintiffs attempt to plead around *Sonner* by including a single, conclusory
 11 allegation that they “have no adequate remedy at law[.]” Compl. ¶ 177. But this
 12 threadbare assertion does not “establish” that legal remedies do not exist or that they
 13 are inadequate. *Sonner*, 971 F.3d at 844; *see also Klaehn v. Cali Bamboo LLC*, No.
 14 21-55738, 2022 WL 1830685, at *3 (9th Cir. June 3, 2022) (affirming dismissal of
 15 UCL claim where “Plaintiffs failed to make any plausible allegation that they lacked
 16 an adequate remedy at law”). Under *Sonner*, Plaintiffs must “allege some facts”
 17 explaining *why* damages are insufficient to make them whole, which they have
 18 utterly failed to do. *Gibson v. Jaguar Land Rover N. Am., LLC*, No. 20-00769-CJC,
 19 2020 WL 5492990, at *3 (C.D. Cal. Sept. 9, 2020) (dismissing UCL and CLRA
 20 claim for equitable relief). In any event, there is no reason damages would be
 21 insufficient here, given that Plaintiffs can recover the exact same sum in legal
 22 damages that they seek in equitable restitution. *See Sonner*, 971 F.3d at 844.

23 Finally, to the extent Plaintiffs claim injunctive relief is necessary to make
 24 them whole, that argument falls woefully short. Plaintiffs are former students who,
 25 by their own accounts, are now *fully aware* that past USC Rossier rankings were
 26 based on allegedly manipulated data, and there is no reason to believe they “will
 27 again be wronged in a similar way” such that injunctive relief would be necessary.
 28 *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *see also Bates v. United*

1 *Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (plaintiff must establish a threat
 2 of future injury to pursue injunctive relief). Moreover, Plaintiffs concede that USC
 3 Rossier has dropped out of the most recent US News rankings, and do not allege any
 4 ongoing misconduct by either Defendant. *See, e.g.*, Compl. ¶¶ 75, 77-78, 80-86, 135
 5 (alleging conduct from April 1, 2009 through April 27, 2022); *Tabler v. Panera LLC*,
 6 No. 19-cv-01646-LHK, 2019 WL 5579529, at *8 (N.D. Cal. Oct. 29, 2019)
 7 (dismissing request for injunctive relief where plaintiff made “no allegation of future
 8 injury in the complaint”).⁷ All of Plaintiffs’ claims therefore must be dismissed.

9 C. Plaintiffs Have No Unjust Enrichment Claim

10 Finally, Plaintiffs’ “unjust enrichment claim,” Compl. ¶¶ 168-178, fails
 11 because “unjust enrichment is not a cause of action” in California. *De Havilland v.*
 12 *FX Networks, LLC*, 21 Cal. App. 5th 845, 870 (2018) (citations omitted); *see also*
 13 *Persona Cosmetics, Inc. v. Societe Des Produits Nestle S.A.*, No. 2:21-cv-04644-
 14 JVS, 2021 WL 6103348, at *4 (C.D. Cal. Nov. 3, 2021) (same). “Unjust
 15 enrichment” does not describe “a theory of recovery,” but an “effect”: the result of
 16 a failure to make restitution under circumstances where it is equitable to do so.
 17 *M&M Consulting Grp., LLC v. JP Morgan Bank, N. A.*, No. 20-01318-JVS, 2021
 18 WL 71436, at *8 (C.D. Cal. Jan. 6, 2021) (citing *Melchior v. New Line Prods., Inc.*,
 19 106 Cal. App. 4th 779, 793 (2003)). As a result, “unjust enrichment cannot stand
 20 alone as an independent claim for relief,” but instead depends on separate, well-pled
 21 causes of action. *Iezza v. Saxon Mortg. Servs., Inc.*, No. 10-03634-DDP, 2010 WL
 22 3834041, at *2 (C.D. Cal. Sept. 28, 2010). For the reasons already given, Plaintiffs
 23 have no well-pled cause of action here, which dooms their unjust enrichment
 24 “claim.” *See, e.g., ConsumerDirect, Inc. v. Pentius, LLC*, No. 21-cv-01968-JVS,
 25 2022 WL 1585702, at *10 (C.D. Cal. Apr. 4, 2022) (dismissing a standalone claim).

26
 27 ⁷ For the same reasons, Plaintiffs fail to allege “any threat of real and immediate
 28 future harm” required to establish Article III standing for injunctive relief.
Franckowiak v. Scenario Cockram USA, Inc., No. 20-8569-JFW, 2020 WL
 9071697, at *4 (C.D. Cal. Nov. 30, 2020).

1 In any event, even if unjust enrichment were a standalone cause of action,
 2 Plaintiffs cannot invoke it because they have not alleged that 2U unjustly retained
 3 any benefit. In California, entitlement to restitution requires (1) receipt of a benefit,
 4 and (2) unjust retention of the benefit at the other's expense. *In re ConAgra Foods*
 5 *Inc.*, 908 F. Supp. 2d 1090, 1113 (C.D. Cal. 2012) (citing *Lectrodryer v. SeoulBank*,
 6 77 Cal. App. 4th 723, 726 (2000)); *see also Hapraz v. Belkin Int'l, Inc.*, No. 09-
 7 5897-VBF, 2010 WL 11519319, at *2 (C.D. Cal. 2010) (dismissing
 8 misrepresentation-based unjust enrichment claim for failure to satisfy Rule 9(b)).

9 Here, however, Plaintiffs never paid 2U anything. Moreover, "plaintiffs
 10 received the benefit of the bargain": in exchange for tuition dollars they paid USC,
 11 they received classes and an eventual degree. *Peterson v. Cellco P'ship*, 164 Cal.
 12 App. 4th 1583, 1593 (2008). Plaintiffs do not explain how they lost money from
 13 USC allegedly excluding selectivity data from its online programs, or otherwise
 14 failed to receive the benefit of the bargain they struck.⁸ There is "no equitable reason
 15 for invoking restitution" where, as here, "the plaintiff gets the exchange which he
 16 expected." *Comet Theatre Enters., Inc. v. Cartwright*, 195 F.2d 80, 83 (9th Cir.
 17 1952); *see also Chuang v. Dr. Pepper Snapple Grp., Inc.*, No. 17-01875-MWF, 2017
 18 WL 4286577, at *8 (C.D. Cal. 2017) (dismissing restitution claim).⁹

19 V. CONCLUSION

20 For the foregoing reasons, and because key defects cannot be cured by
 21 amendment, 2U respectfully seeks dismissal of Plaintiffs' Complaint with prejudice.
 22

23 ⁸ Plaintiffs' speculative allegations about 2U's profit-sharing arrangement with
 24 USC, Compl. ¶¶ 21-40, are entirely irrelevant to the claims Plaintiffs have actually
 25 brought, including for unjust enrichment. That 2U derives some revenue from
 tuition paid by students it recruits does not mean that 2U *unjustly* received that
 revenue, where the students received the education they paid for.

26 ⁹ For the same reason, Plaintiffs have failed to adequately plead how they were
 27 damaged by the rankings-related statements, which is a required element of their
 28 FAL, UCL, and CLRA claims. *See Charbonnet v. Omni Hotels & Resorts*, No. 20-
 cv-01777-CAB, 2020 WL 7385828, at *4-5 (S.D. Cal. Dec. 16, 2020) (dismissing
 FAL, UCL, and CLRA claims for failure to plead economic injury-in-fact).

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